Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANTHONY F. LEPARDO,
D/B/A AFL Disposal Co., Inc.,
Petitioners,

v.

BOARD OF HEALTH AND HOSPITALS OF THE CITY OF BOSTON; LEWIS POLLACK, INDIVIDUALLY AND AS HE IS COMMISSIONER OF THE CITY OF BOSTON, DEPARTMENT OF HEALTH AND HOSPITALS; RONALD JONES, INDIVIDUALLY AND AS HE IS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL AFFAIRS OF THE DEPARTMENT OF HEALTH AND HOSPITALS; JOHN SHEA, INDIVIDUALLY AND AS HE IS PRINCIPAL HEALTH INSPECTOR FOR THE OFFICE OF ENVIRONMENTAL AFFAIRS; AND AL SILVIA, INDIVIDUALLY AND AS HE IS AN INSPECTOR WITH THE DEPARTMENT OF HEALTH AND HOSPITALS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

PETITION FOR A WRIT OF CERTIORARI.

RICHARD J. VITA, P.C.
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August, 1994

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Questions Presented for Review

1. Did the City of Boston's later disavowal of a permit issued to locate a transfer station on property constitute a taking of property without due process of law or just compensation where the only evidence was that operation of a transfer station had been and was the only reasonable use of the land and where the permit was disavowed because the official who approved and issued the permit allegedly lacked the actual authority to issue it?

2. Did the granting of summary judgment deprive the property owner of his right to due process of law where the courts below refused as a matter of law to recognize the property owner's claims of apparent authority, estoppel or detrimental reliance against the city in spite of uncontradicted evidence that the official who issued the permit had issued such permits for years and reasonably believed that he had the authority to do so and that the property owner had acted in reliance on the official's apparent authority to issue the permit?

Opinions Below

On May 25, 1994 the Massachusetts Supreme Judicial Court denied further appellate review of an April 14, 1994 unreported memorandum of the Massachusetts Appeals Court affirming the unreported summary judgments of the Suffolk Superior Court. Lepardo v. Board of Health and Hospitals, 36 Mass.App.Ct. 1114, further appellate review denied, 418 Mass. 1102 (1994).

Jurisdiction of the Supreme Court

Under 28 U.S.C., § 1257, the Supreme Court of the United States has jurisdiction to review the April 14, 1994 memorandum of the Massachusetts Appeals Court which the Massachusetts Supreme Judicial Court declined to review on May 25, 1994.

Constitutional Provisions

"No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." United States Constitution, Amendment XIV.

Statement of the Case

When Anthony Lepardo purchased property in Boston, Massachusetts in 1982, it had been used as a refuse transfer station, a place where refuse is collected temporarily before it is

taken elsewhere, since 1966. He intended that AFL Disposal Co., Inc. would operate the transfer station under ownership of Mr. Lepardo and his sons.[1]

After a public hearing, the Boston Zoning Board of Appeals issued a variance permitting the continued use of the property as a refuse transfer station. The Board found that "this particular parcel of land is, and has historically been, suited for use as a transfer station...," the property owner "would have to perform extensive excavation and demolition of existing structure to use this parcel for any other purpose," and "due to the peculiar conditions of the parcel and the structure thereon ... application of the provisions of the Zoning Code with respect to operation of a transfer station at this site would deprive [the property owner] of the reasonable use of his land."

After another public hearing, an official with the Boston Department of Health and Hospitals who had been issuing such site assignments for years but who was then assigned to the Environmental Section of Inspectional Services, approved the location of a refuse transfer facility at the property. After the property owner paid the City the required fees, a permit was issued. The approval and permit were signed by the Director of Environmental Health Services.

Thereafter, the property owner paid fees to the City to renew the permit. In reliance on the permit, the property owner spent more than $300,000 on improvements to and equipment for the transfer facility.

The Boston Department of Health and Hospitals later notified the property owner that it was their position "that no valid site assignment for the operation of a solid waste transfer station at [the property] presently exists" because the official

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[1] AFL Disposal Co., Inc. has no parent or subsidiary company to be listed under Supreme Court Rule 29.1.

who had approved and signed the permit had not been actually authorized to issue the permit.

On December 23, 1983 the Boston Board of Health and Hospitals filed a complaint in the Boston Housing Court against the property owner, seeking and obtaining an injunction against the operation of a transfer station at the property. That injunction is still in effect.

On May 15, 1984 the property owner filed a verified complaint and claim of jury trial in Suffolk Superior Court against the Boston Board of Health and Hospitals and others seeking declaratory and injunctive relief as well as damages. The property owner complained that the official who issued the permit had actual or apparent authority to do so, that he had relied to his detriment on the issuance of the permit, and that the disavowal of the permit constituted a taking of his property without due process of law and without just compensation in violation of the United States Constitution.

The two law suits were consolidated. On May 25, 1985 the Boston Housing Court granted partial summary judgment against the property owner's claims of apparent authority, estoppel and detrimental reliance. Even though the evidence was uncontradicted that the official who issued the permit had been issuing such permits for years and reasonably believed that he had the authority to do so and that the property owner had acted in reliance on the official's apparent authority to issue the permit by paying the required fees for the permit and its renewals and by incurring expenses to improve the property, judgment entered because, as a matter of law, estoppel could not bind the city.

On May 24, 1989 the Suffolk Superior Court, relying upon this Court's decision in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), granted partial summary judgment against the property owner's taking claims. Even

though there was no evidence that the city had been motivated by health and welfare concerns or that the property could be put to another use, and even though the only evidence was that the property was unsuitable for any other use, judgment entered based upon findings that the city was acting to protect health and welfare and had left the property owner with a "full 'bundle' of property rights."

These judgments were affirmed by the Massachusetts Appeals Court on April 14, 1994. The Massachusetts Supreme Judicial Court denied a timely request for discretionary further appellate review on May 25, 1994.

Argument

The decision below conflicts with decisions of this Court which have required compensation is such cases and which have required an opportunity to litigate facts as a component of due process.

In decisions from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) to Lucas v. South Carolina Coastal Council, ___ U.S. ___, ___, 112 S.Ct. 2886, 2899 (1992) and Dolan v. City of Tigard, ___ U.S. ___, ___, 114 S.Ct. 2309, 2322 (1994), this Court has recognized that, since there are situations where regulation may go too far, constitutional limits must be placed upon the noncompensable exercise of police power. One situation where this Court has consistently required that a property owner be compensated, regardless of any public interest supporting the exercise of police power, is typified by Mahon and Lucas where the property owner has been deprived of all economically beneficial or productive use of his land. See also, e.g., Agins v. City of City of Tiburon, 447 U.S. 255, 260 (1980). In cases such as United States v. Causby, 328 U.S. 256, 262 (1946), this Court has recognized a

compensable taking where the utility of land has been limited and its value diminished.

Here, the city's later disavowal of the permit which had recognized the long-existing use of the property and the rejection of the owner's takings claims by the court below represent a facial taking of property without due process and without just compensation because the owner has been deprived of the only reasonable use of his land. There is and was no evidence that the property could be put to any other use.

Indeed, rather than applying facial taking jurisprudence, the court below did precisely the opposite. By summarily rejecting the owner's claims of apparent authority, estoppel and detrimental reliance, the court below effectively established an irrebuttable presumption that no taking could have occurred. This deprived the property owner of due process of law. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., ___ U.S. ___, ___, 113 S.Ct. 2264, 2279-2283 (1993) [to avoid violating due process, statute must be construed so as not to foreclose factual inquiries].

The opinion in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987), upon which the decision below rested, no longer represents the view of the majority of the Court. See, id, 480 U.S. at 506 [Rehnquist, C.J., with whom Powell, O'Connor, and Scalia, J.J. join dissenting]; Lucas, ___ U.S. at ___ n. 7, 112 S.Ct. at 2894 n. 7 [recognizing that Keystone was "inconsistent" with Mahon. Insofar as the decision below rested upon the power to regulate "noxious uses," Lucas, ___ U.S. at ___, 112 S.Ct. at 2899 held that "the 'noxious use' logic cannot serve as a touchstone to distinguish regulatory 'takings'-- which require compensation -- from regulatory deprivations which do not require compensation."

The decisions of this Court in cases such as Mahon and Lucas plainly mandate compensation for the taking which has

occurred here. Concrete Pipe demonstrates the constitutional flaw in foreclosing inquiry into issues such as apparent authority, estoppel and detrimental reliance. To the extent that the decision below may have rested upon the Keystone majority, that reliance was misplaced in light of Lucas.

This Court should issue a writ of certiorari to the Massachusetts Supreme Judicial Court and reverse.

Respectfully submitted,
Anthony F. Lepardo
d/b/a AFL Disposal Co., Inc.,
Petitioners

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August, 1994

Appendix

Massachusetts Supreme Judicial Court order
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Massachusetts Appeals Court memorandum
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Suffolk Superior Court memorandum
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Boston Housing Court memorandum
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Supreme Judicial Court
for the Commonwealth of Massachusetts
1412 Courthouse. Boston, Massachusetts 02108
(617) 557-1020

Richard J. Vita, Esquire
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Boston MA 02109

RE: Docket No. FAR-07244

ANTHONY P. LEPARDO & another

v.

BOARD OF HEALTH & HOSPITAL8 OF BOSTON & others.

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on May 25, 1994, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated, May 25, 1994

To: Richard J. Vita, Esquire
John T. Walsh, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-P-1424

ANTHONY P. LEPARDO & another[1]

v.

BOARD OF HEALTH & HOSPITAL OF BOSTON & others[2]

MEMORANDUM AND ORDER UNDER RULE 1:28

This ten year old case presents an unduly tangled procedural trail and a nearly unintelligible factual scenario.

In 1976, the commissioner of the department of health and hospitals for the city of Boston ("department") delegated his authority to assign locations for various refuse disposal and transfer stations and to hold public hearings under G.L.c. 111, § 150A, to Lewis W. Pollack, then deputy !commissioner for community health. (A. 68, 116} Deputy Commissioner Pollack in turn delegated his authority to Anthony Cataldo, director of

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[1] AFL Disposal Co., Inc.

[2] The commissioner of health and hospitals of Boston, director of the office of environmental affairs of Boston, and two inspectors.

the department's environmental health inspectional services.[3] (A. 68-69 132-133)

In October, 1976, by ordinance, the Boston City Council banned the operation, establishment or maintenance of any refuse treatment or disposal facility in the city (A. 121), as a result of which, in the fall of 1979, Deputy Commissioner Pollack decided that the department would cease processing applications for site assignments under c. 111, § 150A[4] (A. 69)

By letter dated December 30, 1981, from David Rosenbloom, then commissioner of the department, to Anthony Pepicelli, acting commissioner of inspectional services (A. 197), Rosenbloom stated that the board of health and hospitals of the city of Boston (board) voted to authorize and direct the transfer of employees from the department's division of inspectional services to the city of Boston's inspectional services department and to delegate to it "the power, on behalf of and under the authority of this board, to conduct enforcement activities under any statute, ordinance or regulation heretofore directly enforced or adopted by this [b]oard" (emphasis supplied). The letter also stated that "[t]he [b]oard expressly reserves to itself the power to: conduct hearings pursuant to statute, ordinance

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[3] By affidavit in 1985, Pollack, then commissioner of health and hospitals, averred below that, as deputy commissioner, he "delegated limited authority to ... [Cataldo] reserving to myself the ultimate authority to issue or deny such assignments." (A. 68-69) The plaintiffs and Cataldo agreed that Pollack signed the site assignments. (A. 136, 154-155)

[4] By affidavit, Deputy Commissioner Pollack averred below that "[p]ursuant to that decision, Mr. Cataldo ceased to have any authority to hold hearings on applications for site assignments under [§] 150A." (A. 69)

or regulation the authority for which has not previously been delegated to an officer of the [d]epartment hereby transferred" and concludes "[t]his delegation is effective until withdrawn by this [b]oard." (A. 197, 198) Pursuant to the board's authorization, Cataldo was one of the employees transferred to the inspectional services department and authorized to conduct enforcement activities.[5]

On February 4, 1982, plaintiff Lepardo purchased the property located at 157-171 Hampden Street in Boston for use as a household refuse transfer facility. The property had been used as a refuse transfer facility since approximately 1966. (A. 248)

In June, 1982, the department, through the board, voted to resume the processing of applications for site assignments under c. 111, § 150A. (A. 123) Deputy Commissioner Pollack delegated authority to conduct hearings on such applications to a panel which included Cataldo, but Pollack expressly reserved to himself the authority to issue or deny the site assignments. (A. 70) Thereafter, Cataldo processed plaintiff Lepardo's application for a site assignment, held a hearing and, with the express approval of his superior, Pepicelli,

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[5] Commissioner Pollack averred below that "[s]ince I had rescinded Mr. Cataldo's authority to conduct hearings under [§] 150A in the fall of 1979, Mr. Cataldo did not take with him the authority to conduct hearings under [§] 150A. I retained that authority in addition to my authority to issue or deny site assignments when Mr. Cataldo was transferred to the [i]nspectional [s]ervices [d]epartment of the [c]ity." (A. 69) On deposition, Cataldo testified that he was never informed of any decision rescinding his authority to conduct hearings under § 150A or to issue site assignments. (A. 134-136)

the commissioner of inspectional services (A. 155-157), issued Lepardo the site assignment on November 1, 1982. (A. 142-145, 147-148, 155-157, 162-163)

Thereafter, city officials decided that Cataldo lacked authority to issue the site assignment. By action commenced in the Housing Court in December, 1983, the city sought to enjoin Lepardo from operating or maintaining a transfer station. (A. 7, 83-91) On May 15, 1984, Lepardo commenced this Superior Court action (A. 1, 18-29), alleging (as is here material) violations of due process and an unconstitutional taking, and seeking a declaration that the site assignment was valid.[6]

By order of assignment dated August 22, 1984, the Chief Administrative Justice assigned a judge of the Housing Court to sit in the Superior Court department for the sole purpose of hearing the Superior Court action (A. 1, 41, 42), and the two cases apparently were treated as having been consolidated.

On January 18, 1984, the city moved for partial summary judgment on counts I and II of the Superior Court complaint. (A. 2, 43) By order dated May 29, 1985, a Housing Court judge specially assigned to hear the Superior Court action[7] (A.

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[6] For ease of reference, we shall refer to Lepardo as the plaintiff and to the collective defendants as the city.

[7] This matter was consolidated with a Housing Court action in which the judge reported to this court the issue of whether the Housing Court had jurisdiction. (A. 231-233) We held that the Housing Court lacked jurisdiction, vacated the Housing Court judgment and remanded the case for dismissal of the Housing Court action. Our decision in that case, however, did not affect the Superior Court judgment, and does not bear on the result we now reach.

1, 41, 42) concluded that the board was not estopped to deny Cataldo's authority to issue the site assignment. (A. 227) The judge also concluded, however, that he had to remand the case to the board, the rightful authority, as it had never issued an assignment and thus Lepardo had nothing from which to appeal. (A. 227-228) The judge allowed the city's motion for partial summary judgment, "provided [the city] permits a hearing before the [b]oard of [h]ealth within thirty (30) days to consider the merits of the application." (A. 228-229) Partial summary judgment entered on July 31, 1985.[8] (A. 230)

Despite the ruling that he be given an expedited hearing on a site assignment, Lepardo did not seek a new hearing. This case then languished for over two years until February 3, 1987, when the same judge allowed Lepardo's motion for reassignment and/or transfer to the Superior Court. (A. 2}[9] By memorandum

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[8] Normally, such an order of remand is interlocutory and not appealable as a matter of right, but here, where there was no hearing, and because of the age of this matter (now going on ten years) and because the parties have fully briefed and argued the case on the merits, we decide the issues presented. See Medi-Cab of Mass. Bay, Inc. v. Rate Setting Commn., 401 Mass. 357, 358 n.2 (1987); Lovaco, Inc. v. Zoning Bd. of Appeals of Attleboro, 23 Mass. App. Ct. 239, 244 (1986).

[9] As the judge had been assigned to sit in the Superior Court for this matter, this transfer was unnecessary. However, either through clerical or judicial oversight, the judgment in the Superior Court action had not been entered on the Superior Court docket. That omission does not affect the validity of the partial summary judgment in the Superior Court case.

and order dated November 12, 1987 (A. 3, 238-242), a second judge ruled that our decision in the Housing Court action did not vacate the first judge's entry of partial summary judgment in the Superior Court action. The second judge also ordered that the Superior Court judgment be entered on the Superior Court docket, and further ruled that that judgment barred relitigation of the validity of the site assignment. The case then proceeded to final judgment and Lepardo appealed.[10]

1. Propriety of partial summary judqment.

The plaintiffs assert that there were genuine issues of material fact present as to the apparent authority of Cataldo to issue the site assignment, that the city was estopped to deny the validity of the site assignment, and thus that the first judge erred by allowing the defendant's motion for partial summary judgment. While this argument is not without some force, we nonetheless conclude that the first judge properly ruled that the site assignment issued to Lepardo was invalid as matter of law.

We find compelling the first judge's ruling that Cataldo never had the power to issue a site assignment. By his transfer to the Inspectional Services department, and the limited transfer

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[10] On count II, the second judge ruled that the site was not protected by a grandfather clause in c. 111, § 150A, and that there was no unconstitutional taking of Lepardo's property. (A. 247-252) As best as we can discern from a record which lacks a copy of the amended complaint, the instant appeal concerns only the issues raised in counts I and II of that complaint. The parties stipulated to dismissal of count III below. (A. 253) A jury returned a verdict for the city on count IV, as amended, and the parties stipulated to !dismissal of civil rights claims as set out in that count. {A. 254-255)

to that department of authority for enforcement purposes only, the board expressly reserved the sole authority to issue site assignments. On that premise, the site assignment issued by Cataldo exceeded his authority and was invalid, and thus Lepardo was required to refile his application with the board. Coupled with the judge's reasoned decision to afford the city the opportunity to review Lepardo's application in an expedited hearing, we discern no error.[11]

Finally, we agree with the judge's ruling that the city was not estopped to deny the validity of the site assignment where the board, the entity charged with determining eligibility for site approvals and issuance thereof, had not made any such determination. See Murphy v. Dover, 35 Mass. App. Ct. 904, 905 (1993). See also Building Inspector of Wayland v. Ellen M. Gilford Sheltering Home Corp., 344 Mass. 281, 286 (1962). Generally, estoppel is not applied against the government in *connection* with its exercise of public duties, particularly when the government is acting in the public interest and safety, and where to do so would serve to frustrate the protection of that interest. See Risk Mgmt. Foundation of the Harvard Med. Insts., Inc. v. Commissioner of Ins., 407 Mass. 498, 509-510 (1990); Highland Tap of Boston, Inc. v. Commissioner of Consumer Affairs & Lic. of Boston, 33 Mass. App. Ct, 559,

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[11] In ruling as he did, the judge stated that "[i]t is not apparent to this Court that the [b]oard of [h]ealth will not fairly and in good faith consider Mr. Lepardo's application. If the [b]oard fails to act in good faith, then at that point in time, liability can be imposed upon the individual members. The Court has not a scintilla of evidence before it to suggest that the [b]oard has not or will not afford Mr. Lepardo an independent judgment in good faith to which he is entitled." (A. 228)

568-569 (1992); Municipal Liqht Co.of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 167 (1993).

2. Entry of partial summary judqment on the Superior Court docket.

We find no merit in the argument that the second judge erred by ordering that the first judge's order of partial summary judgment in the Superior Court action be entered on the Superior Court docket. [12] The first judge had been assigned to sit in the Superior Court and, as such, allowed the city's motion for partial summary judgment in that action. Although one judge may undo (albeit hesitantly) the work of another judge, the latter ijudge, as here, would be under rio duty to permit Lepardo to relitigate the issues so decided. See Peterson v. Hopson, 306 Mass. 597, 601, 603 (1940}; Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 622 (1989). As the second judge noted (A. 239-240), this court's order vacating the judgment in the consolidated Housing Court action did not affect the validity of the Superior Court judgment. See n. 7, supra.

3. Other issues. For the reasons stated by the second judge in his memorandum of decision on count II of the amended complaint, we find no merit in Lepardo's argument that his

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[12] It seems that the Superior Court judge treated the issue presented as being one of res judicata (i.e iissue preclusion), but this is a mischaracterization. As the entry of partial summary judgment occurred in this same Superior Court action, there is no judgment iin another original action which could have preclusive effect. If anything, the effect of the Housing Court judge's ruling should more properly be characterized as ithe law of the case. In their briefs to this court, the parties do not exhibit an awareness of the difference.

property should be "grandfathered" so as to receive a site assignment (A. 249-250). We also agree with the judge's determination that the city's actions did not effect a taking of Lepardo's property without just compensation. See Mile Road Corp. v. Boston, 345 Mass. 379, 383 (1963). See also Chief of the Fire Dept. of Boston v. Sutherland Apartments, Inc., 346 Mass. 685, 689 (1964); Rosenfeld v. Board of Health of Chillmark, 27 Mass. App. Ct. 621, 628 (1989).

Judgment Affirmed
By the Court
(Brown, Dreben & Fine, JJ.)

Entered: April 14, 1994

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 68679

ANTHONY F. LEPARDO, d/b/a AFL DISPOSAL CO., INC. & another[1]

VS.

BOARD OF HEALTH AND HOSPITALS
FOR THE CITY OF BOSTON & others[2]

MEMORANDUM OF DECISION AND ORDER ON COUNT II OF THE COMPLAINT

I. BACKGROUND

Count II of the complaint seeks a judgment declaring that under G.L. c. 111, § 150A, the plaintiffs were not required to obtain a site assignment from the Board of Health

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[1] AFL Disposal Co., Inc.

[2] Lewis Pollack, Individually and as Commissioner of the City of Boston, Department of Health and Hospitals; Ronald Jones, Individually and as Director of the Office of Environmental Affairs of the Department of Health and Hospitals; John Shea, Individually and as Principal Health Inspector for the Office of Environmental Affairs; and Ai Silvia, Individually and as an Inspector with the Department of Health and Hospitals.

and Hospitals for the City of Boston (Board of Health) to maintain and operate a refuse transfer facility at 157-171 Hampden Street, Roxbury, Massachusetts. The plaintiffs also are seeking consequential damages for the Board of Health's failure to recognize the allegedly valid site assignment, and a permanent injunction enjoining the defendants from interfering with the plaintiffs' right to operate a refuse transfer facility on their property.

The facts as stipulated in the "Agreed Statement of Facts as to Count II of the Complaint" are as follows. On February 4, 1982, plaintiff Anthony F. Lepardopurchasedtheproperty located at 157171 Hampden Street to use as a household refuse transfer facility. The property had been used as a refuse transfer facility since approximately 1966.

In late 1982, Lepardo applied for and was granted a site assignment as required by G.L. c. 111, § 150A from Anthony H. Cataldo, Director of the Environmental Health Division of the Inspectional Services Department, in return for five hundred dollars ($500.00). Subsequently, Lepardo was notified by Ronald Jones,[3] David Spackman[4], and John

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[3] Ronald Jones is the Director of the Office of Environmental Affairs of the Department of Health and Hospitals. On April 15, 1983, Jones notified Lepardo that there were technical deficiencies in Lepardo's site assignment.

[4] David Spackman is Special Corporation Counsel for the Department of Health and Hospitals. On September 8, 1983, he notified Lepardo that the site was not validly assigned. He explained that Cataldo lacked the authority to grant a site assignment.

Shea[5] that the site had not been validly assigned because Cataldo lacked the authority to issue the permit.

The plaintiffs now contend that they were never required by G.L.c. 111, § 150A to obtain a site assignment from the Board of Health because the property has continually been used as a refuse transfer facility for the past twenty years and as such, the preexisting facilities should be "grandfathered".

II. DISCUSSION

When the plaintiffs first acquired the property, G.L.c. 111, 150A provided that "no place in any city or town shall be established or maintained ... as a site for a facility, unless such place has ... been assigned by the board of health of such city or town." G.L.c. 111, § 150A (as inserted by 1955, c. 310, and as amended through St. 1978, c. 197, § 4). The refuse transfer facility which the plaintiffs intended to maintain and operate on their property is included within the definition of "facility" as used within section 150A. Therefore, the plaintiffs were required to obtain a valid site assignment before operating or maintaining the existing refuse transfer facility.

The plaintiffs maintain that the property should have been deemed to have automatic site assignment because the property had been used as a refuse transfer facility for twenty years. It is the plaintiffs' assertion that it was not necessary to apply for a site assignment.

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[5] John Shea is the Principal Health Inspector for the Office of Environmental Affairs of the Department of Health and Hospitals. On March 12, 1984, he notified Lepardo that his request for a renewal permit would not be processed since the site had never been validly assigned.

In 1955, when the statute was first enacted, section 150A included a "grandfather clause" providing that "[a]ny place in use as ... a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator on the effective date of this act shall be deemed to have been assigned under section [150A]." G.L.c. 111, § 150A (original version). However, the original version of section 150A was inapplicable to refuse transfer facilities, encompassing only sites used as "a dumping ground for garbage, rubbish, or other refuse, or ... for a refuse disposal incinerator." G.L. c. 111, § 150A (original version). Moreover, the plaintiffs' land was not used as a refuse transfer facility in 1955, and the grandfather clause would be inapplicable regardless of whether § 150A appliedto refuse transfer facilities.

In 1970, section 150A was amended to cover refuse transfer facilities. Simultaneously, the grandfather clause was deleted. Thus, after the 1970 amendment, anyone operating a refuse transfer facility was required to obtain a site assignment from the Board of Health. No exception was made for pre-existing facilities. However, the then-owner of the property never obtained a valid site assignment. Therefore, in 1982 when the plaintiff acquired the property, any operation of a refuse transfer facility without a site assignment would have been in violation of section 150A. Contrary to the plaintiffs' assertions, the property is not "grandfathered" and in the absence of a valid site assignment it cannot be operated or maintained as a refuse transfer facility.

The plaintiffs argue that if this court fails to read a grandfather rule into section 150A, as amended by St. 1970, c. 839, the statute constitutes an unfair taking without compensation. However, the right to use property as a refuse transfer facility is not a right immune from governmental action. See Mile Road Corp.v. Boston, 345 Mass. 379, 384

(1963). It has long been held that the Commonwealth has the power to interfere with property rights in order to effect a reasonable protection of the public safety without compensating landowners. Chief of the Fire Department of Boston v. Sutherland Apartments, Inc., 346 Mass. 685, 689 (1964).

In evaluating whether a particular statute effects a taking, it is necessary to consider whether legitimate state interests are advanced by the statute and whether property owners are deprived of economically viable use of the land. Agis v. Tiburon, 447 U.S. 255, 260 (1980). Here, the character of the governmental action of protecting public health and welfare by controlling dumping grounds and refuse transfer sites weighs heavily against finding a taking. See Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 485 (1987). In Keystone, the Supreme Court stated that:

> prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or appropriate of property ... The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not - and consistently with the existence and safety of organized society, cannot be - burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted by a noxious use of their property, to inflict injury upon the community.

Keystone, supra at 489 (quoting Mugler v. Kansas, 123 U.S. 623, 668-669 (1887)(upholding law prohibiting manufacturing and sale of intoxicating liquors).

Although there may be a diminution of the value of the plaintiffs' property, the full value is not taken. Viewing the property in the aggregate, the plaintiffs are still left with a full "bundle" of property rights. Moreover, G.L. c. 111, § 150 mandated proper site assignment before operating a refuse transfer facility twelve years prior to plaintiffs' acquisition of the property and, therefore, left the plaintiffs with no false investment expectations. Therefore, I find that there is no unconstitutional taking of the plaintiffs' property.

ORDER

For all the foregoing reasons, it is hereby ORDERED that entry be made DECLARING that:

1. A site assignment granted by the Board of Health and Hospital for the City of Boston is required to operate and maintain a refuse transfer facility on the premises at 157-171 Hampden Street in the Roxbury District of Boston.

John L. Murphy, Jr.
Justice of the Superior Court

Dated: May 24, 1989

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, s s: HOUSING COURT DEPARTMENT

CITY OF BOSTON DIVISION
CIVIL ACTION
NO./1/6/3/3/3/

JOHN SHEA, Principal Health Inspector
CITY OF BOSTON, ET AL

VS.

ANTHONY LEPARDO, individually and as
President and owner of AFL DISPOSAL CO., ET AL

ORDER

In looking at the complaint of Mr. Lepardo, the Court has come to the conclusion that the Board of Health and Hospitals is not estopped to deny Mr. Cataldo's authority to issue a site assignment. "It is well settled that one dealing with officers of a municipality must at his peril ascertain their powers, and that the municipality is, in general, not bound to estoppel to unauthorized liabilities." Elbe File & Binder Co., Inc. v. Fall River, 329 Mass. 682, 686 (1953). The complaint brought by Anthony F. Lepardo does not fall within one of the exceptions to the rule. Furthermore, the complaint, although it asks for damages does not set forth a recognizable claim upon which a Court could order that award.

Pursuant to G.L.ch. 111, Sec. 150A this Court must remand the case back to the Board of Health and Hospitals for the City of Boston. The Board has never issued an assignment,

therefore there is nothing to appeal from. This Court wants a decision by the Board on the merits as to whether a site assignment should issue. This Court, on this record, is not going to supplant the expertise of the Board whenthe Board has never had the opporutnity, on the merits, to review the application. It is not apparent to this Court that the Board of Health will not fairly and in good faith consider Mr. Lepardo's application. If the Board fails to act in good faith, then at that point in time, liability can be imposed upon the individual members. The Court has not a scintilla of evidence before it to suggest that the Board has not or will not afford Mr. Lepardo an independent judgment in good faith to which he is entitled. See Castelii v. Board of Selectman of Seekonk,15 Mass. App. Ct. 711, 714, 715 (1983).

Under G.L.ch. 111, Sec. 150A, Mr. Lepardo has certain substantial rights if the Board of Health rescinds, suspends or modifies an assignment. But where there has been no valid assignment, there is no right to grieve to the Courts. Unfortunately for Mr. Lepardo, detrimental reliance is not a defense to this action under these facts for, "the inspector sues in the interest of the town and it is not estopped." Building Inspector of Wayland, v. Ellen M. Grifford Sheltering Home Corp., 344 Mass. 281 (1962). The Supreme Judicial Court has determined that the Building Commission has the implicit authority to revoke any illegal permit and this determination will extend to the Board of Health. The motion of the City of Boston for partial summary judgment is allowed provided it permits a hearing before the Board of Health within thirty (30) days to consider the merits of the application. The Court is concerned with the legitimacy and viability of Mr. Lepardo's business - it would be quixotic for Mr. Lepardo to obtain a permit, when he would or could no longer be able to use it.

E. GEORGE DAHER
CHIEF JUSTICE

Date: May 29, 1985

cc:Richard J. Vita, Esq.
Paula V., Kaminow, Special Asst.
Corporation Counsel
Marcia C. Peters, Esq.
John T. Walsh, Esq.

BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
SEP 21 1994
OFFICE OF THE CLERK

No. 94-323

In The

Supreme Court of the United States

October Term, 1994

ANTHONY F. LEPARDO,
D/B/A AFL Disposal Co., Inc.,

Petitioners,

v.

BOARD OF HEALTH AND HOSPITALS OF THE CITY OF BOSTON; LEWIS POLLACK, Individually and as he is Commissioner of the City of Boston Department of Health and Hospitals; RONALD JONES, Individually and as he is Director of the Office of Environmental Affairs of the Department of Health and Hospitals; JOHN SHEA, Individually and as he is Principal Health Inspector for the Office of Environmental Affairs; and AL SILVIA, Individually and as he is an Inspector with the Department of Health and Hospitals,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT W. WALLIS*
Corporation Counsel

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September 21, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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19 pp

QUESTION PRESENTED

Whether the Superior Court and the Appeals Court for the Commonwealth of Massachusetts erred in deciding that the Board of Health and Hospitals was not estopped to deny the authority of a municipal employee unauthorized by law to issue a site assignment to operate a refuse transfer facility.

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OPINIONS BELOW

The Unreported Memorandum of the Appeals Court for the Commonwealth of Massachusetts is listed at 36 Mass. App. Ct. 1114, further appellate review denied, 418 Mass. 1102 (1994).

STATUTES

1955 Mass. Acts 310

1970 Mass. Acts 839

G.L. c. 111, Section 150A

STATEMENT OF THE CASE

In February, 1982, Anthony Lepardo (petitioner or Lepardo) purchased the land and structures at 157-171 Hampden Street, Roxbury, Massachusetts. At this time, and since 1970, G. L. c. 111, Section 150A required anyone wishing to operate a refuse transfer facility, to obtain a site assignment from the local Board of Health (Board). Lepardo knew of this legal requirement and failed to follow it. Instead, in September, 1982, he chose to disregard the law and apply to the Inspectional Services Department (ISD) to obtain a site assignment. In October, 1982, the director of Environmental Health Inspectional Services (EHS), to whom Lepardo wrongly applied for the assignment, was a member of the ISD, not the Department of Health and Hospitals, as Lepardo inaccurately represents. This individual used to be a member of the

Department of Health and Hospitals, but had been transferred to the ISD when this latter department was created in 1981. As an employee of the Department of Health and Hospitals, he had been involved in hearings on site assignment applications, but, contrary to Lepardo's allegations, he had never issued an assignment. This power had always been held only by the Commissioner of the Department of Health and Hospitals, or his designee, the Deputy Commissioner, as explained below.

In 1976, the Commissioner of Health and Hospitals delegated his authority to assign sites for waste disposal and transfer stations pursuant to G. L. c. 111, Section 150A to Lewis Pollack (Pollack), then Deputy Commissioner. Pollack then delegated the limited authority to hold site assignment hearings to the Director of EHS for the Department of Health and Hospitals, but reserved for himself the authority to issue the assignments. This process whereby the director of EHS held assignment hearings, but Pollack himself actually issued the assignments continued until the fall of 1979. At that point, a three year moratorium on the issuance of site assignments commenced.

In 1981, the Director of EHS was transferred to the newly created municipal department, the Inspectional Services Department. After this transfer, the Board voted to delegate its authority to conduct enforcement activities under statutes, ordinances and regulations to ISD, but reserved for itself the power to conduct hearings pursuant to statute, ordinance or regulation, the authority for which had not previously been delegated to an officer of

the department thereby transferred. Pollack had rescinded the authority of the EHS director to hold assignment hearings when the assignment moratorium was declared in 1979. Thus, the EHS director did not take with him the power to hold site assignment hearings, let alone the power to issue site assignments, contrary to Lepardo's allegations.

In June, 1982, the moratorium on assignments was rescinded and the Board began processing applications for site assignments. The only connection the EHS Director had with site assignments when Lepardo applied in 1982, was as one member of a three-member panel who held assignment hearings. This panel was not empowered to issue the assignment; this power resided, as it always had, in the Deputy Commissioner of the Department of Health and Hospitals. The Deputy Commissioner had delegated the power only to hold the hearings to the three-member panel.

After Lepardo applied to the wrong department for the assignment, the EHS Director without authority held a hearing and purported to issue Lepardo an assignment dated November 1, 1982.[1]

In December, 1983, thirteen months after the issuance of the alleged site assignment, Lepardo began to operate

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[1] Petitioner's rendition of the events surrounding the issuance of a "permit" is misleading. It is true that a dump permit was issued to Lepardo. What Lepardo fails to state is that a dump permit is a totally separate document from a site assignment and is totally irrelevant to the facts of this case, which concerns the authority of the individual who purported to issue a site assignment.

a refuse transfer facility at 157-171 Hampden Street. As he was operating without an assignment issued by the Department of Health and Hospitals, the Board commenced an action in Housing Court and successfully obtained an injunction preventing such use without a valid assignment. In May, 1984, Lepardo commenced an action in the Superior Court, alleging, *inter alia*, due process and equal protection violations as a result of the Board of Health's acting to prevent further use without a valid assignment.

These two actions were consolidated, and in May, 1985, the Court, in both actions, ordered Lepardo to submit to a hearing before the proper department, the Department of Health and Hospitals, or else partial summary judgment would be entered in the Board's favor. Lepardo refused to do so, despite the Court's order. Consequently, the Court, in both actions, allowed partial summary judgment in the Board's favor, ruling that the Board was not estopped to deny the authority of the EHS director in issuing the purported site assignment. The Court ruled that detrimental reliance was not a defense against a municipality acting to disavow the validity of an illegal issuance.

In 1989, the Superior Court[2] ruled in the Board's favor that Lepardo was required to obtain a site assignment pursuant to G. L. c. 111, Section 150A to operate a refuse transfer facility. The Court rejected Lepardo's contention that he did not need a site assignment because he

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[2] The Housing Court action had previously been dismissed on a jurisdictional matter not material to anything at issue now.

had "grandfather" rights to operate his facility without one. The Court further ruled that 1970 Mass. Acts 839, which amended 1955 Mass. Acts 310 to require that refuse transfer stations required an assignment, was not a taking of his property. In its decision, the Court pointed out the fact that Lepardo did not acquire his property until 1982 and the statute requiring site assignments became effective twelve years earlier. Lepardo attempts to mislead the Court by saying that there was no evidence that the property could have been put to other use; there was no evidence that it could not have either.

The judgments of the lower Courts were affirmed by the Massachusetts Appeals Court on April 14, 1994. The Massachusetts Supreme Judicial Court, on May 25, 1994, declined to review the Appeals Court's judgment.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Lepardo's application for a writ of certiorari as the lower Court's decision does not conflict with any decision of this Court. Contrary to Lepardo's allegations that this is a taking case, the issue in this case is the power of a municipality to deny the authority of a municipal employee who issues a site assignment without authority. The lower Court properly applied the relevant law of Massachusetts to uphold the municipality's actions.

Lepardo lacks standing to raise the issue of a taking. Although he purports to challenge the actions of the Board of Health and Hospitals in 1983, he is actually challenging the constitutionality of a 1970 amendment

pursuant to which the Board of Health and Hospitals acted. In actuality, he argues that the 1970 law was an unconstitutional taking of his property. As he did not own the property until 1982, he cannot challenge the constitutionality of the 1970 law. Further, as he did not properly apply for the assignment required, but refused to do so, he cannot challenge its constitutionality.

ARGUMENT

The petitioner's writ of certiorari should be denied because there is no conflict between the decision below and any decision of this Court. Further, the plaintiff lacks standing to raise the issue of a taking.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Lepardo has improperly characterized the essential factual and legal nature of this case to argue that the lower Court's decision conflicts with decisions of this Court. Lepardo tries to portray this as a "taking" case; in actuality, it is a case involving the right of the government to enforce a public health statute against those like him who seek to flout the law. Lepardo omits to tell this Court the fact that when he purchased his property, state law, G. L. c. 111, Section 150A, required him to obtain a site assignment granted by the Board of Health and Hospitals (Board) if he wished to operate a refuse transfer facility. He also fails to acknowledge the fact that the law which was being enforced was implemented in 1970, twelve years before he even owned the property.

Lepardo's own actions in refusing to comply with the siting requirements are what prevented his operation of a refuse transfer facility, not any alleged taking by the Board in enforcing a law. Because he failed to apply properly for and obtain an assignment, the Board took Court action to protect the public from illegal property use. The Board was complying with the legal requirement for a site assignment when it disavowed the authority of the individual who improperly issued an assignment. Lepardo improperly characterizes as a taking the Board's action in complying, and enforcing compliance with, the law. The lower Court's decision affirms the legality of the Board's action in disavowing the unauthorized action of a municipal official in granting a site assignment. *See Murphy v. Dover,* 35 Mass. App. Ct. 904 (1993); *see also Building Inspector of Wayland v. Ellen M. Gifford Sheltering Home Corp.,* 344 Mass. 281 (1962). A writ of certiorari is entirely inappropriate in this case which purely and simply involves a municipality's enforcement of a public health statute.

The Court plainly considered and dealt with the taking arguments that plaintiff advanced as an ancillary part of his main case, which was a challenge to the Board's right to deny the authority of the official who illegally issued the assignment. The Appeals Court relied upon the Massachusetts case of *Mile Road Corp. v. Boston,* 345 Mass. 379 (1963) to dispose of plaintiff's taking arguments. In *Mile Road,* the Court upheld a 1962 statute prohibiting the use of certain property as a dumping ground over plaintiff's allegation that the statute was an unconstitutional taking of property that was lawfully used as a dump under the "grandfather clause" of 1955

Mass. Acts 310, Section 2. The Court held that even though the statute in question abrogated the permit and assignment to operate that the plaintiff had, these were not vested property rights immune from governmental action prospectively effective. 345 Mass. at 384. The Court then cited another Massachusetts decision, *Chief of the Fire Department of Boston v. Sutherland Apartments, Inc.*, 356 Mass. 685 (1964), which holds that even with vested property rights, the Commonwealth of Massachusetts has the power under its Constitution to interfere when public safety is involved. Lepardo's attempts to mislead this Court by saying that the Court should have are applied "facial taking jurisprudence" must fail as the lower Court properly applied the applicable law, as it related to the claims of authority, estoppel and taking of property. Lepardo's emphasis on the use of the property in the years before he bought it is irrelevant as it is disposed of by the *Mile Road* case, which the Court properly applied.

Lepardo wrongly alleges that the lower Court relied upon the case of *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 472 (1987) in making its decision. In looking at the decision of the Appeals Court, which is presumably the decision Lepardo seeks to have overturned, there is no mention, let alone discussion, of the *Keystone* case. Rather, the Court relied upon state law to dispose of Lepardo's taking arguments. Even assuming that the decision Lepardo seeks to have overturned is the Superior Court's May 24, 1989 decision, it is also false that the Superior Court relied upon *Keystone*. Although the Court did quote from that case, this reference to *Keystone* came after the Court had already cited the case

of *Mile Road, supra,* to decide that the right to use property as a refuse transfer facility is not a right immune from governmental action. (A. 14) The Court then cites the *Sutherland, supra* decision. It is clear that the Court's decision evinces no conflict with any decision of this Court.

II. LEPARDO LACKS STANDING TO RAISE THE ISSUE OF A TAKING.

As an ancillary reason why this Court should deny Lepardo's writ, Lepardo lacks standing to raise the issues he attempts to raise. It is a fundamental principle of constitutional law that a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights; absent such adverse impact, he lacks standing to argue that the statute would be unconstitutional if applied to third parties. *Ulster County Court v. Allen,* 442 U.S. 140 (1979). In this case, Lepardo purchased the property in question in 1982. His argument that there was a taking is that when the Massachusetts legislature in 1970 amended a 1955 law to require that refuse transfer facilities be sited under G. L. c. 111, Section 150A, without providing "grandfather" rights exempting those facilities that were already operating without an assignment, this amendment was a taking of the property. Lepardo attacks the Board's disavowal of the assignment that he had improperly obtained as a taking because the Board was enforcing the statute that required an assignment. Thus, even though Lepardo owned the property when the Board rightfully acted in 1983 to disavow his improperly obtained assignment, his

real dispute is with the effect of the 1970 law. Since he did not own the property in 1970, he cannot challenge its constitutionality. Lepardo knew in 1982 when he purchased the property that refuse transfer facilities, which he alleges he planned to operate, required a site assignment pursuant to G. L. c. 111, Section 150A. As the Superior Court pointed out in its May 24, 1989 decision, Lepardo's investment-backed expectations could not have been frustrated; he knew of the statutory siting requirement and yet purchased the property anyway. Mr. Lepardo's property was not taken.

It is also true that when a statute, valid upon its face, requires the issuance of a license as a condition to carry out a business, one who is within the statute's terms cannot raise constitutional questions regarding the statute's validity where he has failed to make the required application. *Smith v. Cahoon,* 283 U.S. 553 (1931) In this case, Lepardo is not attacking the 1970 amendment on its face; he is saying that as applied to those who already operated refuse transfer facilities in 1970, it operated as a taking. He never applied to the Department of Health and Hospitals, the agency authorized by law to assign sites. He applied to the Inspectional Services Department and refused the lower Court's order to apply for a hearing before the Board of Health and Hospitals. For this reason also, Lepardo lacks standing to question the constitutionality of the 1970 amendment requiring site assignments for refuse transfer facilities.

CONCLUSION

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

Respondent Board of
Health and Hospitals,
et al.,
By their attorney
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APPENDIX

1955 Mass. Acts 310 ..... A1

1970 Mass. Acts 839 ..... A2

G. L. c. 111, Section 150A A3

Relevant Portions of 1955 Mass. Acts 310
AN ACT CONCERNING THE ASSIGNMENT OF PLACES FOR PUBLIC AND PRIVATE DUMPS.

Be it enacted as follows:

Section 1. Chapter 111 of the General Laws is hereby amended by inserting after section 150 the following section:

– Section 150A. No place in any city or town shall be established or maintained by any person, including any political subdivision of the commonwealth, as a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator unless such place has been assigned by the board of health of such city or town as a dumping ground or as a site for a refuse disposal incinerator subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier law. . . .

Section 2. Any place in use as, or publicly held or licensed for use as, a dumping ground for garbage, rubbish or other refuse or as a site for a refuse disposal incinerator on the effective date of this act shall be deemed to have been assigned under section one hundred and fifty A of chapter one hundred and eleven of the General Laws, but such assignment may be rescinded, suspended or modified in like manner as an assignment made under said section one hundred and fifty A, as appearing in section one of this act.

Relevant Portions of 1970 Mass. Acts 839
AN ACT FURTHER REGULATING THE ASSIGNMENT OF SITES FOR THE ESTABLISHMENT AND OPERATION OF REFUSE DISPOSAL FACILITIES.

Be it enacted, etc., as follows:

Chapter 111 of the General Laws is hereby amended by striking out section 150A, as most recently amended by section 1 of chapter 515 of the acts of 1969, and inserting in place thereof the following section: –

Section 150A. As used in this section, 'facility" means a sanitary landfill, a refuse transfer station, a refuse incinerator with a grate area in excess of ten square feet, a refuse composting plant, a dumping ground for refuse or any other works for treating or disposing of refuse;. . . .

No place in any city or town shall be established or maintained or operated by any person, including any political subdivision or agency of the commonwealth, as a site for a facility, unless such place has either been assigned by the board of health of such city or town as a site for a facility after a public hearing, subject to the provisions of any ordinance or by-law adopted therein under chapter forty A or corresponding provisions of earlier laws, or, in the case of an agency of the commonwealth, has been assigned by the department after a public hearing and unless public notice of such assignment has been given by the board of health. . . .

Relevant Portions of G. L. c. 111, Section 150A

"Facility", a sanitary landfill, a refuse transfer station, a refuse incinerator rated by the department at more than one ton of refuse per hour, a resource recovery facility, a refuse composting plant, a dumping ground for refuse or any other works for treating, storing, or disposing of refuse.

No place in any city or town shall be maintained or operated by any person, including any political subdivision of the commonwealth, as a site for a facility, or as an expansion of an existing facility, unless, after a public hearing, such place has been assigned by the board of health of such city or town in accordance with the provisions of this section, or, in the case of a facility owned or operated by an agency of the commonwealth, such place has been assigned by the department after a public hearing and unless public notice of such assignment has been given by the board of health or the department, whichever is applicable.

Supreme Court, U.S.
FILED

94 323 AUG 23 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

APPENDIX #2 OF 2 TO
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Laurence A. Elgin
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22003
(202) 628-1114

148 pp

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My commission expires:

My Commission Expires June 22, 1990

[NOTE: IN READING THIS DOCUMENT, ENTITLED "DEALER TRIAL FRANCHISE", ONE SHOULD REMEMBER THAT UNDER THE STATUTE, PLAINTIFF HOAI IS NOT A TRIAL FRANCHISEE, DESPITE THE USE OF THE WORD "TRIAL" BECAUSE HE PREVIOUSLY OPERATED STATIONS AND HAD WORKED FOR SUN OIL CO.]

SUN 420-I-T.F.

Date: March 27, 1986
Duns No: 0004-4180-14
Division: 750

DEALER TRIAL FRANCHISE
PART I
COVER PROVISIONS

THIS TRIAL FRANCHISE is made and executed by the herein named Company and Dealer for purposes of stating the terms and conditions by which Company will make available for sale, Company's branded motor fuels to Dealer, and Dealer will operate Dealer's business, including the resale of Company's branded motor fuels to the public, at the Premises described below. This Trial Franchise constitutes a "trial franchise" as that term is used in and

defined by Title 1 of the Federal Petroleum Marketing Practices Act, 15 U.S.C. section 2801, et seq., hereinafter referred to as "the Act".

COMPANY:	SUN REFINING AND MARKETING COMPANY
COMPANY'S ADDRESS:	1801 MARKET STREET Philadelphia, PA 19103
DEALER:	THANH VONG HOAI
PREMISES' ADDRESS:	2305 Pennsylvania Ave., S.E. Washington, D.C. 20020

TYPE OF MOTOR FUEL FRANCHISE: RETAIL GASOLINE SALES: Full and Self Service BUILDING USE: Conventional 3-Bay Service, Canopy and Kiosk

TERM: THE TERM OF THIS TRIAL FRANCHISE IS ONE YEAR, BEGINNING ON APRIL 10, 1986, AND ENDING MARCH 31, 1987. COMPANY MAY ELECT NOT TO RENEW THIS TRIAL FRANCHISE AS OF THE DATE LAST ABOVE STATED BY PROVIDING DEALER WITH WRITTEN NOTICE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 104 OF THE ACT. THE PROVISIONS OF SECTION 102 OF THE ACT,

LIMITING THE RIGHT OF COMPANY TO FAIL TO RENEW A FRANCHISE RELATIONSHIP ARE NOT APPLICABLE TO THIS TRIAL FRANCHISE. IN ADDITION, COMPANY MAY TERMINATE THIS RELATIONSHIP PRIOR TO THE DATE LAST ABOVE STATED IN THE EVENT OF A VIOLATION OR BREACH OF THIS TRIAL FRANCHISE RELATIONSHIP, OR OF THE TERMS AND CONDITIONS CONTAINED IN THIS TRIAL FRANCHISE, OR FOR ANY REASON ALLOWED BY SAID ACT.

RENT: Dealer shall pay to Company rent for said Premises, in monthly installments in accordance with the following schedule: For the period April 10, 1986 through April 9, 1987, Four Thousand five Hundred Eighty Five Dollars ($4,585.00) per month. Each monthly installment is due and payable in advance, without demand or notice, on or before the fifth (5th) day of the month. Rent shall be prorated on a daily basis for

periods of less than one (1) month.

HOURS AND DAYS OF OPERATION: Dealer will operate Dealer's business and the Premises in the manner required by this Trial Franchise during the following hours per day and days per week: 24 hours a day/7 days a week

COMPANY'S EQUIPMENT: For use by Dealer in promoting and selling Company's branded motor fuels, Company loans to Dealer, for the term of this Trial Franchise, the following equipment which is or will be installed on said Premises by Company: 3 - Single Retros Leaded, 6 Retros Blended, 2 - Single Retros, Diesel, 2 - Sunoco Diamond Signs & Poles, 1 - Set Sunoco Letters

UNDERLYING LEASE: NOT APPLICABLE

PERSONAL SUPERVISION: This Trial Franchise is made on the condition and understanding that Thanh Vong Hoai will personally manage the daily operation of Dealer's business.

Prior written consent of Company is required in the event the above named individual desires to cease personal management of Dealer's business. Said consent of Company shall not be unreasonably withheld.

COLLATERAL DEPOSIT: Terms and conditions governing collateral deposits listed below are set forth in Part IV Collateral Deposit Provisions.

Federal identification of Social Security No.: 586-40-1891, State Code No.: 16

Cash Portion of Deposit Only: Five Thousand Dollars ($5,000.00)

Plus an additional amount to be accumulated from time to time at the rate of one-half (1/2 cent) cents per gallon on all deliveries of motor fuel until a total of Twenty Five Thousand Dollars ($25,000.00) has been accumulated.

CREDIT CARD IMPRINTER: Dealer acknowledges

receipt of two (2) Credit Card Imprinter and Mount Box unit(s) and agrees to pay Company in advance a rental at an annual rate of Forty Dollars ($40.00) per unit, effective the first day of the month following installation and extending to the next June 30th. Subsequent annual rental charges will date from July 1st for each succeeding year. Installation and maintenance costs of said units shall be paid by Company.

Dealer agrees not to remove said unit(s) from the Premises where installed, and to pay Company One Hundred Thirty Two Dollars ($132.00) per unit in the event said unit(s) are lost or destroyed. Dealer agrees to return said unit(s) to Company upon request and hereby gives Company the right to remove the same at any time without notice and, in either event Company shall refund any unearned prepaid rental.

Company reserves the right at all times to change the foregoing rental upon giving Dealer thirty (30) days' prior written notice.

PARTS OF DEALER TRIAL FRANCHISE:

Part I Cover Provisions
Part II General Provisions
Part III Lease Provisions
Part IV Collateral Deposit Provisions
Part V Credit Card Acceptance Provisions
Part VI Maintenance Provisions
Part VII Daily Recordkeeping and Inventory Control Provisions

The Provisions above constitute Parts of this Trial Franchise, and are incorporated therein and made a part thereof for all purposes.

NOTE TO DEALER: This is a binding legal document containing several Parts. You should carefully read each Part before signing in the space provided below.

EXECUTED THE 8TH DAY OF APRIL, 1986

WITNESSES: DEALER:

/s/ E.Peele /s/ Thanh Vong Hoai

COMPANY:

/s/ Betty J. Boyd BY: /s/ JH Vaughn

TITLE: DIVISION SALES MANAGER

* * * * *

9. UNCONTROLLABLE EVENTS/ALLOCATION

Company and Dealer shall be forgiven their respective obligations hereunder to the extent that performance is delayed or prevented by causes reasonably beyond the control of either party, except any accounts owed by either party to the other. Company may allocate products among Dealer and other customers in the event it determines that any curtailment, shortage, or unavailability of products for any reason whatsoever exists and shall not be obligated to make up shortages resulting therefrom, nor shall Company be liable to Dealer for loss of sales, profits or business by reason of such allocation.

* * * * *

15. NOTICES

Any notices required by, or otherwise given in connection with, this Dealer Franchise shall be in writing and signed by the party giving such notice. Any notice directed to Company shall be mailed or delivered to Company's address stated in Part 1 Cover Provisions, and notices directed to Dealer shall be mailed or delivered to Dealer at the Premises.

* * * * *

17. ENFORCEMENT; APPLICABLE LAW; RENEWAL, NONRENEWAL AND TERMINATION OF THIS DEALER FRANCHISE

a. Company has the right to enforce and require specific performance of all provisions of this Dealer Franchise including, but not limited to, Company's right to seek injunctive relief or any other rights or remedies available to Company.

b. This Dealer Franchise is subject to and governed by the Act, which is made part of this Dealer Franchise for purposes of expressing the grounds upon which it may be terminated and nonrenewed by Company. The Company's right to terminate or nonrenew under the Act shall be in addition to, and not in extinguishment of, all other rights and remedies provided in favor of Company by applicable law and this Dealer Franchise. Therefore, should Dealer fail to substantially comply with, or violate, any requirement imposed upon, or promise made by Dealer in this Dealer Franchise, Company may nonrenew or terminate this Dealer Franchise.

c. Prior to the end of the term of this Dealer Franchise, Company may determine to renew and continue its franchise relationship with Dealer on the basis of proposed changes and additions to the

provisions hereof (including, but not limited to, changes in the rates and amounts of rent to be paid by Dealer for the Premises); and shall advise Dealer of same. All such changes and additions proposed by Company shall be the result of determinations made by Company in good faith and in the normal course of business. Should Dealer and Company fail to agree upon such changes and additions, Company shall have the right, upon notice to Dealer, to nonrenew this Dealer Franchise and the franchise relationship with Dealer as of the end of the term stated in Part I Cover Provisions. Should Dealer and Company agree upon such changes and additions, then Company agrees to renew this Dealer Franchise and continue the franchise relationship with Dealer, subject to and in accordance with the agreed changes and additions and the execution by

both parties of a renewal Dealer Franchise.

d. In the event Company should violate any substantive provision of this Dealer Franchise and not promptly correct same, Dealer may terminate this Dealer Franchise with Company at any time upon 90 days' prior written notice to Company. Said written notice must specify the particular reason or reasons which give rise to such termination in order to be effective.

e. Upon the effective date of the termination or nonrenewal hereof,

(1) All unpaid accounts owed by Dealer to Company, shall be due and payable in full, and shall bear interest from such date until paid at the rates established by Company's credit terms with Dealer;

(2) Dealer shall cease the use of Company's brand identification and credit card system, and shall forthwith return the same to Company, together with all of

Company's loaned Equipment, in good order and condition, at Dealer's expense;

(3) Company shall repurchase from Dealer all Company branded motor fuels at Dealer's cost therefor; the amount thereof to be paid to Dealer or applied to Dealer's unpaid account with Company, as determined by Company.

* * * * *

19 . SALE AND ASSIGNMENT

a. Subject to the following provisions, Dealer may make a sale of Dealer's business:

(1) For purposes hereof, a "sale of Dealer's business" includes: (a) any reorganization of Dealer's business, such as incorporation or the formation of a partnership or other business entity subsequent to the date of this Dealer Franchise whereby another person, not previously a party hereto, acquires rights

with respect to Dealer's business or its operation; (b) any transfer or assignment of an interest in Dealer's business or any part thereof or an assignment or subletting in whole or in part of the Premises to any person, firm or corporation not a signatory party hereto. The term "Dealer's business" includes purchasing and reselling of Company's branded motor fuels and the use and possession of the Premises. A change in the marital status of Dealer, if an individual, and granting of a lien or security interest in Dealer's business for financing purposes, shall not constitute a sale of Dealer's business.

(2) At least sixty (60) days' prior to the effective date of a sale of Dealer's business, Dealer shall notify Company in writing of such sale. The notice to Company shall include the name and the current address of the purchaser(s),

together with the purchase price, if any, and all other essential terms and conditions of the sale. Copies of all documents (including the proposed sale contract) that will be used in connection with the sale shall also be provided to Company. Dealer represents to Company that all information supplied to Company with respect to a sale of Dealer's business is true and correct.

(3) Upon receipt of Dealer's notice given pursuant to preceding paragraph, Company shall thereafter have at least sixty (60) days' time to conduct an examination of the purchaser's credit standing, financial condition, business suitability to function as a franchisee of Company and to evaluate the proposed sale of Dealer's business. In this respect, Dealer and purchaser(s) shall provide Company with all information as Company requests for purposes of making its

examination. Dealer shall bear the cost of the examination of the purchaser's credit standing. Such examination, and any disapproval or conditioned approval made by Company shall be in accordance with, and based upon, reasonable and objective business practices and standards. Company shall not be held liable for any losses caused Dealer by such disapproval or conditioned approval.

(4) If, in Company's opinion, based upon objective and accepted business practices, such person does not have sufficient credit standing or business experience to function as a dealer in the manner required by this Dealer Franchise, then Company shall notify Dealer in writing of its opinion and may refuse to permit the contemplated sale of Dealer's business, or by such writing may condition its approval upon a revision of credit terms, upon execution by such party

of a Trial Franchise (ass that term is used in the Act) as a substitute of this Dealer Franchise and upon the attendance and successful completion by such party of Company's dealer training school.

(5) If, based upon Company's examination, such person acquiring an interest in Dealer's business does have sufficient credit standing and business experience to function as a dealer in the manner required by this Dealer Franchise, then Company shall approve the assignment without condition, except Company shall have the right to require such person to execute a Trial Franchise (as that term is used in the Act) as a substitute for this Dealer Franchise and to require such person to attend and successfully complete Company's dealer training school.

(6) Each actual or contemplated sale of Dealer's business, shall be made subject to

the foregoing provisions of this Dealer Franchise. An assignment of this Dealer Franchise, whether or not made in the manner permitted by these provisions shall not alter or discharge Dealer's obligations hereunder to Company, except as agreed to beforehand in writing by Company, or when the sale of the Dealer's business is made to Company.

(7) Should Dealer complete a sale of Dealer's business in whole or in part and fail to notify Company as above required, or make a sale or assignment which has been disapproved by Company or fail to provide Company with complete information as requested by Company, such action or failure, as case may be, shall be treated for all purposes as fraud.

b. Company may assign this Dealer Franchise to any distributor, jobber, refiner or other "franchisor". as that word is used in

the Act subject to the following:

(1) Assignee shall agree in writing with the Company to perform and comply with all of the Company's obligations hereunder.

(2) Company shall notify Dealer in writing of the name and the address of assignee and the effective date of assignment.]

(3) Such assignment when made in the manner above provided shall not be treated as either a termination or nonrenewal of this Dealer Franchise, or of any of the Dealer's rights as a "franchisee" under the Act, but this Dealer Franchise and Dealer's rights shall continue in full force and effect. Assignee shall succeed to all the rights and privileges provided in favor of Company under this Dealer Franchise and the Act.

* * * * *

7. SURRENDER OF PREMISES:

a. This Lease and Dealer's use and possession of the Premises (including all assignments and subletting by Dealer) shall end as of the effective date of the termination, nonrenewal or cancellation of this Dealer Franchise, whereupon Dealer shall immediately surrender, quit and return possession of the Premises to Company. Notice and demand to quit and for possession and re-entry by Company are waived.

b. Should Dealer fail to surrender, quit and return possession of the Premises to Company at the end of this Lease, Company shall have the right to enter upon the Premises and evict Dealer therefrom for purposes of repossessing the same without having liability to Dealer for trespass or damage by reason of such re-entry and eviction.

c. In addition to Company's right of re-

entry and eviction, Company may detain, distrain and take possession of all property belonging to Dealer and others found on the Premises for unpaid rent, and may sell or otherwise dispose of such property in accordance with applicable law, without liability to Dealer by reason of such action. Subject to the foregoing, Dealer shall remove all of Dealer's personal property from the Premises at end of this Lease, and any property left or found upon the Premises ten (10) days after Dealer has been requested to remove the same, may be removed, stored, or disposed of by Company without liability to Dealer for the value, loss or damage thereto occasioned by such removal storage or disposition. Costs incurred by Company for removal, storage and disposition of Dealer's property so left or found upon the Premises shall be borne by Dealer and paid

to Company.

d. Notwithstanding the foregoing, and without waiving any of its rights to evict Dealer and re-enter the Premises, which rights shall be continuing and remain in full force and effect from and after the end of this Lease, if Dealer remains in possession of the Premises for whatever reason other than by virtue of a separate agreement in writing signed by Company, then Company may elect to treat Dealer as a tenant at will of the Premises, subject to the further right to terminate such tenancy upon thirty (30) days' prior written notice to Dealer, and Dealer shall be obligated to pay to Company, and Company shall be entitled to collect from Dealer, rental for said tenancy equal to one hundred fifty (150%) per cent of the final monthly installment of rent stated in Part I Cover Provisions, or any amendment and

ratification thereto, of this Dealer Franchise for each thirty (30) days or part thereof of said tenancy at will. Acceptance by Company of rent for said tenancy at will, and Company's decision, failure or delay in evicting Dealer and re-entering the Premises at the end of this Lease shall not be treated or construed as a renewal of this Dealer Franchise (or this Lease which renewal cannot be made except by written agreement for that purpose signed by Company.

* * * * *

[EXCERPT FROM PREVIOUS HOAI DEALERSHIP WITH SUN OIL]

SUNMARK INDUSTRIES

[LOGOS]

A Division of Sun Oil Company of Pennsylvania

September 21, 1981

Mr. Thanh V. Hoai
7906 Cherrywod Lane
Greenbelt, Md. 20770

Re: Contract #0017-8475-01

Dear Mr. Hoai:

We are pleased to enclose the following

paper/papers which have been completely executed:

1) Letter of Consideration
2) Maintenance Letter
3) Dealer's Agreement
4) Inventory Control Amendment to Dealer's Agreement
5) Credit Card Acceptance Agreement
6) Imprinter Agreement
7) Night Delivery Letter

Please retain these documents for your files.

Very truely yours
SUNMARK INDUSTRIES, a Division of Sun Oil Company of Pennsylvania

/s/ JW Zalewski
J. W. Zalewski

Enclosures

JWZ:h

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:
	:
Plaintiff,	:
	:
v.	: Civil Action
	: No. 87-2456
SUN REFINING AND MARKETING COMPANY.	: Judge Oberdorfer
	: Magistrate Attridge
Defendant.	:

DEFENDANT'S NOTION FOR SUMMARY JUDGMENT
ON THE ISSUE OF EXEMPLARY DAMAGES

COMES NOW Defendant, Sun Refining and Marketing Company, by counsel, and moves the Court to enter Summary Judgment in its favor and against Plaintiff on the issue of exemplary damages for the reason that there is no genuine issue as to any material fact and Defendant is entitled to the entry of judgment on the issue of exemplary damages as a matter of law.

In support of this Motion, Defendant submits the attached Memorandum of Points and Authorities and Statement of Material Facts as to Which There if (sic) No Genuine

Issue.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

J. Gordon Forester, Jr. #4424
/s/ Stephen H. Abraham #385849
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605
Telephone: (202) 452-1400

[July 11, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	87-2456
SUN REFINING AND	:	Judge Oberdorfer
MARKETING COMPANY.	:	Magistrate Judge
Defendant.	:	Attridge

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
ON THE LIMITATION OF DAMAGES
FROM SEPTMBER 8, 1986 TO APRIL 27, 1987

The defendant moves this Court to grant summary judgment on the issue of damages by limiting Hoai's claim to reasonable profits, if any, from the station at 2305 Pennsylvania Avenue, S.E. for the period from September 8, 1986 to April 27, 1987.

The attached Memorandum of Points and Authorities and the Statement of Material Facts As To Which There is No Genuine Issue are attached in support of this motion.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.
/s/ J. Gordon Forester, Jr. #4424
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605
Telephone: (202) 452-1400

[July 26, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 87-2456
SUN REFINING AND MARKETING CO.	:	Judge Oberdorfer
	:	Magistrate Attridge
Defendant.	:	

MOTION IN LIMINE FOR EVIDENTIARY RULINGS

This is the defendant's second Motion In Limine. The first was to establish the period of time for which the franchisee may be entitled to lost profits, if any. In the response to this Motion, plaintiff has raised a number of issues which go far beyond the question of damages that is before this court. In fact, if plaintiff were able to proceed with the irrelevant issues he has raised, it would expand this trial far beyond the three days which have been scheduled.

This court has ruled that Mr. Hoai's

franchise was improperly terminated on September 8, 1986, and that the franchise was actually terminated with notice on April 28, 1987. Therefore, based upon this ruling, Mr. Hoai would be entitled to claim the profits of the station during that period, provided he can establish that any profits were earned. Thompson v. Kerr-McGee Refining Co., 660 F.2d 1380 (10th Cir. 1981). It is respectfully requested that the court [-1-]

* * * *

[Dec. 21, 1990]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456
SUN REFINING AND MARKETING COMPANY, INC.,	)	Judge Oberdorfer
	)	Mag. PJA
Defendant.	)	

PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT ON EXEMPLARY DAMAGES

It is not relevant that the law does not favor punitive damages because Congress has prescribed a standard in the Act defining when they are to be granted. The common law of the District has been preempted on this point. We ask the Court, therefore, to ignore defendant' recitation of the common law of punitive damages and concentrate instead on the mandate of Congress.

The only issue here, as the Court pointed out, is whether there was the

required willfullness. As the Court noted in colloquy, there is no question here that there was disregard of 15 U.S.C. 2802, but as to whether it rose to the level of willful disregard the Court said it was not yet convinced. Plaintiff agrees this question remains to be analyzed. The memorandum supporting the motion is not particularly helpful in this regard.

Plaintiff suggests that a proper analysis can be arrived at by ignoring the attempts of the defendant to import into the language of the Act an element of scienter which Congress chose not to include. There are many acts of Congress in which a requirement of willfulness is conjoined by an "and" with a requirement

[-1]

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 87-2456
SUN REFINING AND	)	
MARKETING CO.	)	Judge Oberdorfer
Defendant.	)	

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S SECOND MOTION IN LIMINE
(for Evidentiary Rulings)

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ATTACHMENTS

#1 Order of Oberdorfer, J. of October 17, 1991
#2 Motion In Limine filed by Sun, November 15, 1991
#3 Motion In Limine filed by Sun, December 21, 1991
#4 Motion For Protective Order and for Discovery Conference filed by Sun, filed January 10, 1991
#5 Transcript of Telephone Conference of October 15, 1990
#6 Request for Admissions filed January 8, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI Plaintiff, v. SUN REFINING AND MARKETING COMPANY, INC., Defendant.	)))))Civil Action) No. 87-2456) Judge Oberdorfer) Mag. PJA))

OPPOSITION OF THE PLAINTIFF TO DEFENDANT'S MOTION TO LIMIT THE DAMAGES WITHOUT AUTHORITY TO DO SO

I. INTRODUCTION

The motion of the defendant to artificially limit the amount of damages plaintiff may show at trial demonstrates no authority for this proposition in the Petroleum Marketing Practices Act itself, 15 U.S.C. 2801, et seq., (PMPA) or in the reported case law. It relies, in its supporting memorandum, upon misrepresentations of existing law, and upon inappropriate analogies. Further,

there is a disturbing pattern that has now become the normal practice by defendant in this case, (unfortunately,) of some seriously distorted and even false representations of the facts thus far demonstrated or those that are contended and of what has already been decided in the various litigations of Mr. Hoai.

II. STATUTE ITSELF: CLEAR LANGUAGE: NO LIMITATION

First, we turn to the clear language of the statute itself: The only section. at issue here, since plaintiff sought no injunctive relief, is subsection 15 U.S.C. 2805(d). The full text of that section is as follows: [-1-]

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VONG HOAI Plaintiff,	)	
v.	)	Civil Action No. 87-2456
SUN REFINING AND MARKETING COMPANY, INC., Defendant.	)	Judge Oberdorfer Mag. PJA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON EXEMPLARY DAMAGES IN THE AMOUNT OF $650,000.00

Plaintiff moves the Court to grant him summary judgment for exemplary damages pursuant to 15 U.S.C. 2805(d)(1)(B) $650,000.00 based on the recent verdict of the jury on compensatory damages and the admissions of the defendant that it made no effort to ascertain whether it was complying with the Act or not when it illegally terminated the plaintiff, an amount designed to deter a corporation with the income and assets of the defendant whereas any lesser amount would

not do so, given the conduct of the defendant Sunoco then and throughout this proceeding.

Respectfully submitted.

THANH VONG HOAI

By:
/s/ Laurence Elgin #159582
8929 Sleaford Place,
Annandale, Virginia 22003
(202) 628-1114

[FACSIMILE OF A LETTER FROM SUN OIL]
[Written six months after the franchise was destroyed by the Sun Oil Consent Agreement AND NOT Hoai, but extortionist Vo was in possession of the station, as Sun knew.]

SUN
[Logo]

Sun Refining and Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

March 2, 1987
Duns Number: 0004-4180-14

Thanh Vong Hoai
2305 Pennsylvania Ave. S.E.
Washington, DC 20020

Dear Mr. Hoai:

Please refer to your Dealer Trial Franchise, dated March 27, 1986, between you and Sun Refining and Marketing Company, hereinafter referred to as "Sun". As you know, Sun's representative has attempted to verify your compliance with its Daily Recordkeeping and Inventory Control Provisions, as required in the above Franchise. Sun sent you a letter dated December 3, 1986, asking that you

comply with this provision. Your continued failure to comply with the requirements of this program leaves Sun no alternative but to terminate its franchise relationship with you.

Therefore, please take notice that effective April 7, 1987, Sun intends to terminate your Dealer Trial Franchise dated March 27, 1986, for the above-stated reason, and as per the following sections of the Federal Petroleum Marketing Practices Act:

Section 102(b)(2)(A)	Your failure to comply with a provision of the franchise, which is both reasonable and of material significance to the franchise relationship.
Section 102(b)(2)(B)	Your failure to exert good faith efforts to carry out the provisions of the franchise.
Section 102(c)(11)	Your knowing failure to comply with Federal, State or local laws or regulations relevant to the operation of the marketing

premises.

Attached to this notice is a Summary of Title 1 of the Federal Petroleum Marketing Practices Act.

Very truly yours,
SUNOCO MARKETING

/s/ H.J. Vaughn
H. J. Vaughn
Sales Manager

Attachment
cc: D.M. Zebley
H. L. Zoretic
E. L. Peele
B. J. Boyd

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[FACSIMILE OF A MEMORANDUM OF SUN OIL]

Subject Thanh Vong Hoai - 004-4180-14

(Thanh Van Vo)

SUN
[Logo]

Interoffice Correspondence

Date June 18, 1987
Location Twin Oaks Terminal
From J.F. Prendergast
To J. Wagner

In accordance with your request, we attach hereto Company's check number 8742 dated June 17, 1987 in the amount of $10,300.03 made to the order of Thanh Van Vo per your request.

The enclosed check covers all open credits remaining on the subject account, and per your instructions, due to legal requirements, have made the check payable as outlined above.

In your correspondence with Mr. Van Vo it

should be made clear that any charges coming back to the account i.e. chargebacks, credit card differences, etc. will be his responsibility and that we will expect immediate payment of same.

We are sending a copy of this correspondence to our credit file as the subject account is now closed and in a deleted status. Should any additional information be required or if any additional assistance is needed, please feel free to contact the writer.

/jed cc: E. Peele
D. Snyder
Credit File

[FACSIMILE OF A LETTER FROM SUN OIL]

SUN

[Logo]

Sun Refining and
Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

January 22, 1987

Mr. Thanh Vong Hoai
2305 Pennsylvania Avenue, S.E.
Washington, DC 20020

RE: Contract No. 0004-4180-14

Dear Mr. Hoai:

Your one-year Dealer Trial [sic] Franchise

with Sun Refining and Marketing Company ("Sun") will expire March 31, 1987. When Sun entered into this franchise relationship with you on April 10, 1986, its performance expectations were for you, at a minimum, to match and moderately exceed the gallonage of your immediate predecessor.

Unfortunately, the operation of the station has not met Sun's expectations or standards. There has been a significant drop in the historical volume of gasoline sold from this station. I believe this is due in large part to the distractions caused by the dispute you are having with Thanh Van Vo. Regardless of the reasons, the operation of the stations has fallen well below Sun's standards. As a consequence, Sun has elected to non-renew your franchise effective April 27, 1987.

Attached to this notice is a Summary of Title I of the Petroleum Marketing Practices Act.

Very truly yours,

/s/ H J Vaughn
Harold J. Vaughn
Sales Manager

/jed

cc: David Hemenway, Esquire
Thanh Van Vo
J. Wagner, Esquire
E. Peele

Certified Mail
Return Receipt Requested

[FACSIMILE OF A LETTER FROM SUN OIL]

[Written six months after Hoai was removed from the station and three months after franchise termination]

SUN

[Logo]

Sun Refining and
Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

December 3, 1986

Thanh Vong Hoai
2305 Pennsylvania Ave., S.E.
Washington, DC 20020

Duns Number: 0004-4180-14

Dear Mr. Hoai:

Sun Refining and Marketing Company's (Sun's) representative called on you at the above address on November 26, 1986, to verify your compliance with Sun's Daily Recordkeeping and Inventory Control Program. Your contractual obligation regarding this matter is specifically outlined in your Dealer contract under the Daily Recordkeeping and Inventory Control Provisions.

These Provisions specify that you shall, on a daily basis, maintain adequate inventory records, on all petroleum product stored underground, including a reconciliation of sales, receipts, and inventory on hand. Said Provisions further specify that you shall permit Sun to inspect your underground storage inventory records, when Sun desires to monitor your compliance.

As you know, compliance with the Provisions of this Program is of benefit to you, Sun, and the general public, the purpose being to prevent product loss and environmental contamination. To assure compliance with these Provisions, each Dealer's underground storage inventory records are being verified, periodically, by Sun's representative.

Please be advised that Sun, as your supplier, views your failure to comply with the terms and conditions of this Program as a violation of a substantive provision of our franchise relationship, and of the above-mentioned provision of your Dealer contract.

Also, if you are not keeping proper gasoline inventory records, you are in violation of the Federal Occupational

Safety and Health Administration (OSHA), Service Station Regulation 1910.106(g), which specifically requires a Dealer to maintain and reconcile accurate DAILY physical and book inventory records of Dealer's underground storage of petroleum products to provide early detection of any leaks from such underground tanks and/or piping installation. In addition, there may be local, municipal and/or state laws which require petroleum storage inventory recordkeeping compliance.

Sun's representative will again call on you, at your location, in the next thirty (30) days, at which time we expect you to be in full compliance, in all respects, with the Provisions of the Daily Recordkeeping and Inventory Control Program.

The potential problems associated with leaks caused by petroleum products stored underground is of grave concern, and your complete cooperation is anticipated.

Very truly yours

SUNOCO MARKETING

/s/ H.J. Vaughn
H.J. Vaughn
Sales Manager

cc: Ernie Peele
Dealer File
H. Vaughn

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[FACSIMILE OF A LETTER FROM SUN OIL]
[Written six months after the franchise was destroyed by the Sun Oil Consent Agreement AND NOT Hoai, but extortionist Vo was in possession of the station, as Sun knew.]

SUN
[Logo]

Sun Refining and Marketing Company
4041 Market Street
Aston PA 19014
215 499 5700

March 2, 1987
Duns Number: 0004-4180-14

Thanh Vong Hoai
2305 Pennsylvania Ave. S.E.
Washington, DC 20020

Dear Mr. Hoai:

Please refer to your Dealer Trial Franchise, dated March 27, 1986, between you and Sun Refining and Marketing Company, hereinafter referred to as "Sun". As you know, Sun's representative has attempted to verify your compliance with its Daily Recordkeeping and Inventory Control Provisions, as required in the above Franchise. Sun sent you a letter dated December 3, 1986, asking that you

comply with this provision. Your continued failure to comply with the requirements of this program leaves Sun no alternative but to terminate its franchise relationship with you.

Therefore, please take notice that effective April 7, 1987, Sun intends to terminate your Dealer Trial Franchise dated March 27, 1986, for the above-stated reason, and as per the following sections of the Federal Petroleum Marketing Practices Act:

Section 102(b)(2)(A)	Your failure to comply with a provision of the franchise, which is both reasonable and of material significance to the franchise relationship.
Section 102(b)(2)(B)	Your failure to exert good faith efforts to carry out the provisions of the franchise.
Section 102(c)(11)	Your knowing failure to comply with Federal, State or local laws or regulations relevant to the operation of the marketing

premises.

Attached to this notice is a Summary of Title 1 of the Federal Petroleum Marketing Practices Act.

Very truly yours,
SUNOCO MARKETING

/s/ H.J. Vaughn
H. J. Vaughn
Sales Manager

Attachment
cc: D.M. Zebley
H. L. Zoretic
E. L. Peele
B. J. Boyd

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

EXCERPTS FROM PREVIOUS HOAI DEALERSHIP

COLLATERAL DEPOSIT AGREEMENT

US Post Office Address	Contract No
Thanh Vong Hoai	0017-xx5-01
7906 Cherrywood Lane	District:
Greenbelt, Md. 20770	Wash/652

Federal Identification: 586-40-1891
State Code Number 39

THIS AGREEMENT, MADE THIS 26TH DAY OF AUGUST, 1981, BY AND BETWEEN SUN OIL COMPANY OF PENNSYLVANIA, A CORPORATION, HAVING ITS PRINCIPAL OFFICE AT 1608 WALNUT STREET, PHILADELPHIA, PENNSYLVANIA, HEREINAFTER CALLED COMPANY, AND THANH V. HOAI OF 7906 CHERRYWOOD LANE, COUNTY OF PRINCE GEORGE'S AND STATE OF MARYLAND 20770

* * * * *

Cash Portion of Deposit: $11,000

* * * * *

Witnesses at Signing
/s/J A Hagens /s/Thanh Vong Hoai
Sun Oil Company of Pennsylvania
By /s/ A. McCarthy
Credit Manager

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 87-2456
SUN REFINING AND	:	Judge Oberdorfer
MARKETING CO.	:	Magistrate Attridge
Defendant.	:	

MOTION IN LIMINE
FOR DETERMINATION OF DAMAGES

This Court has entered partial summary judgment for plaintiff on the issue of liability under the Petroleum Marketing Practices Act by the Memorandum and Order filed on October 1, 1990. The court has also permitted the defendant to file this Motion In Limine to set forth the period of time for which the plaintiff may be entitled to claim damages.

By this endeavor to determine the time period for the damage claim, the defendant does not waive any rights or

objections to this court's opinion on liability. The defendant intends to preserve this issue for argument in another forum after a final judgment has been issued as to liability and damages.

Since this court has ruled that Sun terminated Mr. Hoai's franchise by the Consent Order of September 8, 1986; and, it is uncontroverted that the franchise was actually terminated by Sun with notice pursuant to the PMPA on April 27, 1987, it is therefore submitted that the period for the damages claimed by Mr. Hoai is within those inclusive dates.

* * * *

NOTICE TO SURRENDER PREMISES

CITY OF WASHINGTON :

:

DISTRICT OF COLUMBIA : ss:

:

aUGUST 25, 1986 :

TO: THANH VAN VO

You are hereby personally given notice to quit the premises located at 2305 Pennsylvania Ave., S.E., Washington, D.C. 20020, which is the Sunoco Service Station at that address.

You are to surrender the possession thereof and surrender all keys, records, supplies and equipmen now therein upon the service of this notice under penalty of the law.

You are further notified that failure to suit the premises will result in your

being named as a violator of Section 22-3101 of the Code of the District of Columbia, which can result in up to one year imprisonment.

You have been named in no legal capacity whatsoever that would justify your refusal to quit the premises by the legal holder of the lease, Thanh Vong Hoai, and your continued illegal presence on the property after the serving of this notice and after you have repeatedly threatened the legal leaseholder will not prove to be in your best interests.

/s/ John D. Hemenway
John D. Hemenway D.C. #379603
Attorney for Thanh Vong Hoai
(202) 371-6710

CERTIFICATE

I have read the within contained notice and certify that I am the legal holder of the Dealer Franchise for the Sunoco Station at 2305 Pennsylvania

Avenue, S.E., Washington, D.C. 20020 and that I have authorized Attorney John D. Hemenway to take all necessary action to remove Thanh Van Vo from the premises who has [r]ejected me, the rightful owner, and refused to leave.

August 25, 1986 /s/ Illegible
THANH VONG HOAI

STATEMENT OF WITNESS

I, Ernie Peel, am the company representative of SUNOCO, and I have witnessed Thanh Bong Hoai's signing of the within contained certificate and I can declare that he is the holder of the SUNOCO lease at 2305 Penn. Ave., SE and is the only person authorized to be in possession of this station.

August 25, 1986 /s/ Ernie Peele
Ernie Peel

[EXCERPTS FROM DEPOSITION OF DAVID ROSEMAN]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(CIVIL DIVISION)

THANH VONG HOAI, Plaintiff	)	
vs.	)	CA No.
SUN REFINING AND MARKETING CO.,	)	87-2456
Defendant	)	LFO/PJA
	)	

Washington, D.C.
Tuesday
June 25, 1991

Deposition of:

DAVID ROSEMAN

called for examination by counsel for the Plaintiffs, pursuant to notice, in the conference room, Jones, Day, Reavis and Pogue, 1450 G Street, N.W., 7th Floor, Washington, D.C.

* * * * *

Q [Elgin, counsel for Hoai] Who were you representing at that time when you had these conversations?

A [p.10] Mr. Thanh Van Vo.

* * * * *

Q * * * Did you have occasion to discuss with Mr Wagner [Sun's Attorney] the possibility of settling or compromising the conterversy between your client and the Sun Company?

* * * * *

A [p.12] During the course of my conversations with Mr. Wagner, we discussed the possibility of settling the dispute immediately before, immediately before the court involving the temporary restraining order and avoiding the necessity to go to a preliminary injunction hearing following the entry of the temporary restraining order.

Q Who were you told was representing Sun Oil?

A [p.13] Well, my first question to Mr. Wagner was, are you currently being

represented in connection with the lawsuit that was pending in the Superior Court between Mr. Vod and Mr. Hoai.

Q What did he say?

A * * * and it was at that point then that I began to discuss with Mr. Wagner what had taken place at the temporary restraining order hearing.

Q And by that, do you mean that you told Mr. Wagner what had taken place there?

A That's correct.

Q * * * [p.14] What did he [Wagner] say to you?

* * * * *

A Well, the substance was, what is the next step in the course of the proceeding? Where do you see this going from here? What is -- I think he may have asked me to what extent I saw a need for Sun Oil to be independently represented by counsel,

whether we were requesting any monetary damages from Sun Oil, that kind of thing, things that I guess we, as attorneys, would normally think that an in-house counsel would be immediately concerned about knowing that his company has just been sued.

* * * * *

Q [p15] You mentioned that there came a time in yhour conversation with Mr. Wagner when you discussed the possibility of avoiding a follow-on preliminary injunction hearing. Did I understand that correctly?

A That's correct.

* * * * *

Q * * * [p.16] Who initiated this topic, yourself or Mr. Wagner?

A Oh, I initiated it. * * * I do recall that he was receptive to the thought or to the concept of Sun Oil remaining as a

nejutral party in the dispute as opposed to taking an affirmative stand on either side of the dispute or becoming embroiled in unnecessary litigation.

Q When he discussed the possibility of Sun Oil becoming a neutral party, did hyou make any suggestions to him about how Sun Oil might accomplish that?

A Well, I initiated the suggestion that, in order to maintain the status quo, Sun simply agree to continue to supply petroleum products and related products to the lawful occupant of the service station.

Q And what did Mr. Wagner say when you suggested that>?

A Well, he reacted positively to that and, while I don't recall his specific words, the substance was that he thought that made a lot of sense based on Judge Wagner's ruling as to who the lawful

occupant of the service station was.

* * * * *

Q [p.20] Did you suggest to Mr. Wagner on that occasion any specific procedure by which this might be done, this elimination of the possibility of the follow-on preliminary injunction hearing?

* * * * *

A * * * the thought that I communicated to Mr. Wagner was that if Sun would simply agree to continue to provide the products to the lawful occupant of the service station, then inasmuch as my client was the [p.21] lawful occupant and had been reinstated in that capacity by Judge Wagner, that we did not see any need to go forward and seek any further equitable relief and I further noted the relevant federal rule of civil procedure, at least in that instance, would have been the counterpart Superior Court rule that

provided for a continuation of the temporary restraining order through a consent order procedure.

Q You're speaking of Rule 65?

A Yes. * * * [p.22] Following my conversation with Mr. Wagner, I drafted a form of consent order5 that I thought complied with the requirements of Rule 65 and faxed it off to Mr. Wagner for his review.

* * * * *

Q * * * [p.24] Now do I understand you to be saying that the draft was essentially negotiated between yourself and Mr. Wagner and then Mr. Forester's [Sun Oil attorney just entering case] signature line was added?

* * * * *

A * * * [p.27] I wouldn't characterize it as a negotiation. I'd characterize it as a reaction, a comment on a consent

order draft. I made changes as a result of that. I can not say for certain whether I did have a subsequent exchange with Mr. Wagner or not after that. It is possible. It's possible that we did it all in that one telephone conversation following the fax of the draft. **This was not discussed as being a significant matter**. [Emphasis added] This was discussed as being simply a way of maintaining the status quo while the lawsuit continued between Mr. Vo and Mr. Hoai.

Q You mentioned in one of your earlier answers that you had informed Mr. Wagner of the procedure by which a temporary restraining order might be extended through a consent order. Is that correct?

A Well, I mentioned the rule on injunctions, [the] [p.28] Superior Court rule on injunctions and noted that it was

very similar, if not identical to the corresponding federal rule of civil procedure. Now whether Mr. Wagner had independent knowledge of that, I don't know. I don't know that I was the first person to inform him of it, in other words.

* * * * *

Q [p.38] Were you aware that the Federal Petroleum Marketing Practices Act existed?

A [p.39] Yes.

Q How long had you known about it?

A I don't know how to answer that question. I don't have any particular awareness of a moment in time when I came to learn of it.

Q Let me rephrase the question.

A Let me finish, if I may. In my practice, I had heard of it and had some familiarity with it but nothing beyond

that.

Q Did your conversation with either Mr. Wagner or Mr. Forester in this period leading up to and through September the 8th include any discussion of the District of Columbia Retail Service Station Act?

A It did not.

Q Did you know that Act existed?

A At what time?

Q During this operative period.

A I probably did but I can not tell you when I came to know of the existence of that Act.

Q Did you have any discussion with either [p.40] Mr. Wagner or Mr. Forester in that period up to and through September the 8th, 1986 as to who was the franchisee of the gas station in question?

A I do not recall specifically discussing who the franchisee is. The subject of the lawsuit between Mr. Vo and

Mr. Hoai bore upon that so, to the extent that I explained the substance of our request for relief, I guess we could say that we touched upon that but, beyond that, I have no recollection.

* * * * *

Q [p.42] * * * Was there any discussion between you and either Mr. Wagner or Mr. Forester as to whether or not there should be a signature on this consent order on behalf of Mr. Hoai or the other two parties in the lawsuit?

A I don't recall any such discussion.

Q When you explained the procedure as you've described it for extending the TRO through a consent order to Mr. Wagner, did you mention to him or did he mention to you whether or not this could be done without notifying the other parties in the lawsuit?

A I don't recall discussing that at

all.

* * * * *

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

THANH VAN VO, D/B/A SUNTECH SUNOCO, INC.,	)	
Plaintiff,	)	Civil Action
v.	)	No. 7075-86
THANH VONG HOAI, et al.,	)	[SIGNED ON
	)	9-08-86]
Defendants.	)	

CONSENT ORDER FOR EXTENSION OF TEMPORARY RESTRAINING ORDER AS TO DEFENDANT SUN REFINING AND MARKETING COMPANY

THIS MATTER having come before the

Court upon the pleadings and other papers heretofore filed herein and upon the representations of counsel and it appearing to the Court that on August 29, 1986, a Temporary Restraining Order was issued in this cause on motion of Plaintiff, Thanh Van Vo, after the hearing of testimony, and arguments of counsel; and it further appearing that the Plaintiff and Sun Refining and Marketing Company have, as evidenced by the endorsements hereon by counsel, agreed that the terms and conditions of the Temporary Restraining Order should be continued with respect to Plaintiff and Defendant Sun Refining and Marketing Company, until March 31, 1987 or the prior resolution of the dispute bnetween Plaintiff and Defendant Thanh Vong Hoai over rights to operate the gasoline startion at 2305 Pennsylvania Avenue,

S.e., Washington, D.C. as a franchisee and lessee of Sun Refining and Marketing Company, so long as Plaintiff complies with the terms and conditions of that certain one-year Dealer Trial Franshise Agreement appearing as Exhivit 1 to the Verified Complaint as if he were an original signatory thereto. A non-renewal of said Agreemnent or a termination for failure to comply with the terms and conditions thereof will not [-2-] be deemed a violation of this Consent Order. It is by the Court this 8 day of September, 1986,

ORDERED, that the following paragraph (2) of the Temporary Restraining Order of August 29, 1986 is hereby extended as to the Plaintiff and the Defendant, Sun Refining and Marketing Company, so as to continue to maintain the status quo ante as between Plaintiff and Defendant Sun

Refining and Marketing Company:

> (2) That the Defendant, Sun Refining and Marketing Company, shall continue to supply the plaintiff with the branded petroleum products and to permit Plaintiff to operate the Station and to permit him to occupy the Station under the same terms and conditions as existed between Plaintiff and Sun Refining and Marketing Company prior to August 25, 1986. Such products are to be delivered so long as plaintiff pays the sums due for same.62

AND IT IS FURTHER ORDERED, that this extension shall continue until further order of this Court or until March 31, 1987 or the prior resolution of the dispute pending in this cause between the Plaintiff and Defendant, Thanh Vong Hoai, over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washington, D.C. as a granchisee and lessee of Sun Refining and Marketing Company and so long as Plaintiff continues to comnply with the terms and conditions

of that certain one-year Dealer Trial Franchise Agreement appearing as Exhibit 1 to the Verified Complaint as if it were an original signatory thereto,k it being the sense of this Consent Order that a non-renewal of said Agreement or a termination for failure to comply with the terms and conditions hereof will not be deemed a violation of this Consent Order;

AND IT IS FURTHER ORDERED, that a copy of said Restraining Order, together with a transcript of the Court's reasons therefor stated on the record and incorporated into the Temporary Restraining Order by reference is attached to and made a part of this Consent Order;

[-3-]

AND IT IS FURTHER ORDERED, that the cash bond posted by Plaintiff in the amount of $3,000 shall remain in effect for the duration of the Restraining Order

or until further order of the Court.

This Consent Order shall not be construed to extend the said Restraining Order as to any other defendant.

/s/ Stephen F. Eilperin
Judge
[stamp] "signed in chambers"

Seen and Agreed:

/s/ David C. Roseman
David C. Roseman per MFO
D>C> Bar No. 226969
Jones, Day, Reavis & Pogue
1250 Eye Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 682-4095

Attorney for Plaintiff

/s/ J Gordon Forester, Jr.
Gordon J. Forester, Jr.
D.C. Bar No. 4424
Pohoryles & Greenstein, P.C.
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 785-2940

Attorney for Defendant
Sun Refining and Marketing Company

Mail copies to:

David C. Roseman, Esq.

Jones, Day, Reavis & Pogue
1250 Eye Street, N.W., Suite 1100
Washington, D.C. 20005

Gordon J. Forester, Jr.
Pohoryles & Greenstein, P.C.
1920 N Street, N.W., Suite 800
Washington, DC 20036

Laurence A. Elgin, Esq.
2762 Woodley Place
Washington, D.C. 20008

Retail Service Stations

*****

Section 10-225. Sale, assignment, or other transfer of a marketing agreement.

(a) No distributor shall unreasonably withhold his approval of any sale, assignment, or other transfer, including any transfer of the retail dealer's aright, privilege, or authority to occupy a retail service station pursuant to a marketing agreement, of a marketing agreement or any interest therein to another person by a retail dealer.

(b) No retail dealer shall sell, assign, or otherwise transfer a marketing agreement or any interest therein unless he furnishes prior written notice to the distributor of his intention to make such sale, assignment, or other transfer. Such notice shall be sent to the distributor by

registered or certified mail and shall include the prospective transferee's name and address, a statement of the prospective transferee's financial qualifications, a statement of the prospective transferee's business experience during the previous 5 years, and a statement of the prospective transferee's ability, character, and credit history.

(c) The distributor shall either approve or disapprove such sale, assignment, or other transfer in writing within 60 days after receipt of the notice specified in subsection (b) of this section. A distributor's failure to notify the retail dealer of his approval or disapproval shall be construed as an approval of the proposed sale, assignment, or other transfer.

(d) In order for a sale, assignment,

or other transfer of a marketing agreement to be valid, the prospective transferee shall agree in writing to comply with all valid requirements, conditions, and provisions of the existing marketing agreement which may be applicable.

(e) (1) A prospective transferee shall have the right to terminate or repudiate any sale, assignment, or other transfer of a marketing agreement or any interest therein for any reason, without the imposition of any damages or penalties for such action and without any recourse by the transferor or distributor for such action, within 7 days, not including Saturdays, Sundays, or holidays, after the day on which the sale, assignment, or other transfer is consummated. In order to exercise his right under this subsection, the transferee shall:

(A) Mail written notice, by

registered or certified mail, to the transferor and the distributor of his intention to exercise his right under this subsection within the period specified in this subsection;

(B) Discontinue use of any trademark presently being used by such transferee pursuant to the marketing agreement;

(C) Deliver or tender, so far as is practical, to the transferor or distributor, as appropriate, all money, equipment, and merchantable products which have been loaned, sold or delivered to the transferee by either the transferor or the distributor and which the transferee has not already sold, within 10 days after mailing the notice specified in this subsection; and

(D) Deliver or tender to the transferor full possession of any

retail service station transferred to the transferee within 10 days after mailing the notice specified in this subsection.

(2) The transferee shall receive full credit; or the cash equivalent, for all money, equipment, and merchantable products delivered or tendered to the transferor or distributor, as appropriate, pursuant to subparagraph (C) of paragraph (1) of this subsection. Nothing contained within this subsection shall be construed as granting a similar right to terminate or repudiate to either the transferor or the distributor.

(f) (1) Upon the death or retirement of a retail dealer, the distributor shall grant a 1-year trial marketing agreement in the name of a successor who has been designated by the retail dealer and approved by the distributor. The designated successors shall be limited to

a retail dealer's spouse, adult children, adult stepchildren, and the approval of the designated successor by the distributor shall not be unreasonably withheld.

(2) In order for the requirement in paragraph (1) of this subsection to be effective, the retail dealer shall have provided written notice to the distributor designating the successor dealer. The distributor shall approve or disapprove the designated successor, in writing, within 60 days after receipt of the written designation notice. A distributor's failure to notify a retail dealer of the approval or disapproval of any designated successor shall be construed as an approval of the designated successor.

(3) A 1-year trial marketing agreement shall contain the same terms and

conditions as were contained in the marketing agreement in effect prior to the retail dealer's death or retirement. Pursuant to the provisions of this subchapter, a successor dealer, with the approval of the distributor, may sell, assign, or otherwise transfer the trial marketing agreement granted under paragraph (1) of this subsection.

Section 10-226. Civil Actions

*****

(b) No prospective transferee shall have a cause of action against a distributor as a result of the distributor's disapproval of a proposed sale, assignment, or other transfer of a marketing agreement.

*****

[This Chapter contains an additional five pages.]

UNITED STATES CODE

1988 Edition

CHAPTER 55. PETROLEUM MARKETING PRACTICES

*****

Section 2801. Definitions

As used in this title:

(1)(A) The term "franchise" means any contract--

*****

(ii) between a refiner and a retailer,

*****

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies

motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes--

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed--

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which

has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a

refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

*****

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in

connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of an agreement to deliver such levels.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type

distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure does not include--

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship--

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of

the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978] of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

*****

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce--

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State

of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

*****

Section 2802. Franchise relationship

(a) General prohibition against termination or non-renewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may--

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise

relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or non-renewal

(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if--

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination

of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to

exert good faith efforts to carry out the provisions of the franchise, if--

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive

knowledge of such occurrence--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(b)(1)[15USCS Section 2804(b)(1)].

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if--

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d) [15USCS

Section 2804(d)]; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are

located, if--

(i) such determination--

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises--

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104 [15 USCS Section 2804], either made a bona fide offer to sell, transfer, or assign to the

franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if--

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if--

(i) the franchisee was promptly

apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978] (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise

entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if--

(i) such determination is--

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either--

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as--

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to

grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise--

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse,

violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) Failure by the franchisee to operated the marketing premises for--

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration,

mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or

renewed)--

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

Section 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship--

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions

For purposes of this section--

(1) The term "trial franchise" means any franchise--

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship are not applicable to such trial franchise.

(2) The term "trial franchise" does

not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise--

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of

a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal--

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from

the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements

If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship--

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if--

(A) such nonrenewal is based

upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E) of this title are satisfied.

Section 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or non-renewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship--

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days

prior to the date on which such termination or non-renewal takes effect.

(b) Additional requirements applicable to franchisor

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section--

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor--

(i) may not establish a new franchise relationship with respect to

such premises before the expiration of the 30-day period which begins--

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall--

(A) furnish notification to the

franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section--

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain

(A) a statement of intention to terminate the franchise or

not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required

to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

Section 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard

to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court

determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if--

(A) the franchisee shows--

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that,

on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced--

(A) more than 90 days after the date on which notification pursuant to

section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the

franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled- . (A) consistent with the Federal Rules of Civil Procedure, to

actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection

(a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the

court that--

(A) the basis for such nonrenewal is determination made by the franchisor in good faith and in the normal course of business--

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions

to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

Section 2806. Relationship of statutory provisions to State and local laws

(a) Termination or nonrenewal of franchise

To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to

the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Transfer or assignment of franchise

Nothing in this subchapter authorizes any transfer or assignment of any

franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

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[There follows Subchapter II concerning Octane Disclosure under the PMPA]